Nadler: Court-Stripping Pledge Bill is an Affront to the American Tradition of Liberty

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WASHINGTON, D.C. – Rather than offer real solutions to rising gas prices, stagnant wages, or the lack of affordable health care in this country, the House of Representatives today decided to consider H.R. 2389, the Pledge Protection Act. The bill would limit federal courts’ jurisdiction over cases pertaining to the Pledge of Allegiance, and while clearly unconstitutional, offered the GOP majority a chance to distract and divide Americans. The House will vote on the measure shortly.

Congressman Jerrold Nadler led the opposition to the bill. His remarks follow as prepared for delivery:

“I really hate to be an “I-told-you-so,” but when, in 2003, we considered legislation to strip the federal courts of jurisdiction, to hear cases challenging the Defense of Marriage Act, I warned that there would be no end to it.

In fact, when we first marked up this bill, I asked my friend, the Chairman of the Constitution Subcommittee, whether there would be other court stripping bills. He assured me that this, and the marriage bill, were the only ones “so far.” As we know, he was being, as always, truthful.

Our former colleague, Bob Barr, the author of the Defense of Marriage Act, whose legislation Congress was purporting to protect said “no thanks.” He wrote,

“[This bill] will needlessly set a dangerous precedent for future Congresses that might want to protect unconstitutional legislation from judicial review. During my time in Congress, I saw many bills introduced that would violate the Takings Clause, the Second Amendment, the Tenth Amendment, and many other constitutional protections . . . The fundamental protections afforded by the Constitution would be rendered meaningless if others follow the path set by [this bill].”

Bob Barr was right, and you can quote me. Today, it’s the turn of the religious minorities.

Once upon a time, a student could be expelled from school for refusing to recite the pledge. In 1943, the Supreme Court, in West Virginia Board of Education v. Barnette, held that children had a First Amendment right not to be compelled to swear an oath in violation their religious beliefs.

This legislation would, of course, strip those families of the right to go to court and defend their religious liberty. Schools could expel children for acting according to the dictates of their faith, and Congress will have slammed the courthouse door in their faces.

As dangerous as this legislation is, even for an election season, it is part of a more general attack on our system of government which includes an independent judiciary whose job it is to interpret the Constitution, even if those decisions are unpopular.

Sometimes we don’t like what the Court says. I don’t like that they struck down part of the Violence Against Women Act, or the Gun Free Safe School Zones Act, or that they are misapplying the Commerce Clause and the 11th Amendment to gut some of our civil rights laws. I really didn’t like it that Republican-appointed Justices put someone in the White House who got more than half a million votes less than the other candidate. I don’t hear my colleagues on the other side screaming about judicial activism in those cases.

As wrong as I believe the current Supreme Court to be on so many issues, I understand that we cannot maintain our system of government, and especially our Bill of Rights, if the independent judiciary cannot enforce those rights, even if the majority doesn’t like it.

This House appears infected with a hostility toward the rule of law. This bill is a perfect example. Even more egregious is the way it has reached the floor. The Judiciary Committee twice voted against reporting this bill to the House. The no vote was bipartisan. Now, the Republican majority is abusing its power to bring it to the floor anyway.

Neither the Parliamentarian nor the Congressional Research Service has been able to find another case like this. They report, “ we found one instance of a bill or joint resolution, between the 100th Congress (1989-1990) and the current Congress, where a committee specifically voted not to report a measure that was later considered by the House.” That measure was a 1996 agriculture bill that was rejected in Committee and later folded into a reconciliation bill.

Now the Republican majority exceeds even that arrogance. We are asked to vote on a bill that guts our system of government when the Committee tasked with its consideration rejected it.

Must be an election year.

To return to Justice Jackson in the Flag Salute case. He observed that:

“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”

But now some would strip the courts of any ability to protect these individual rights against an intolerant majority.

As to the complaints about “unelected judges,” I would refer my colleagues back to their high school civics text books. We have an independent judiciary precisely to rule against the wishes of the majority, especially when it comes to the rights of unpopular minorities. That’s our system of government, and it is a good one. As Alexander Hamilton said in Federalist 78:

“The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in

practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all reservations of particular rights or privileges would amount to nothing.”

Where would this bill leave religious liberty? The Republicans tell us state courts can protect those rights. What would this mean? It would mean that your rights may be protected in one state, but not in another. I thought the 14th Amendment to our Constitution settled that issue.

We are playing with fire here. Do you really hate unpopular religious minorities so much that you are willing to destroy the First Amendment? I urge my conservative colleagues to shape up and act like conservatives for once. We live in a free society that protects unpopular minorities even if the majority hates them. Feel free to hate if you must, but leave our Constitution alone.”

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